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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA BRANDON MCCAVITT, Defendant and Appellant.	C076173 (Super. Ct. No. P13CRF0303)

Defendant Joshua Brandon McCavitt was drunk and driving home from a bar when his truck crossed the center line of the roadway and crashed head-on into a car driven by Denise Caldwell, who did not survive the collision. Defendant was convicted by jury of second degree murder and gross vehicular manslaughter while intoxicated. He admitted to having been released from custody on bail for another felony offense at the time he committed these crimes. The trial court sentenced defendant to serve an indeterminate term of 15 years to life in prison for the murder, plus a consecutive

determinate term of two years for the out-on-bail enhancement, and imposed other orders.

On appeal, defendant contends: (1) the trial court prejudicially erred and violated his federal constitutional right to a fair trial by admitting into evidence a video defendant watched during a driving under the influence (DUI) class he attended in Hawaii, in connection with a prior DUI conviction in that state; (2) the prosecutor committed prejudicial misconduct by eliciting testimony from the California Highway Patrol (CHP) officer who questioned defendant at the scene of the collision regarding his opinion defendant lacked remorse and was more concerned about himself than the deceased victim; (3) the cumulative prejudice flowing from the foregoing claims requires reversal; and (4) the trial court further erred by failing to hold a post-verdict hearing on defendant's mislabeled motion to discharge his retained counsel and have new counsel appointed to represent him during the sentencing hearing.

We affirm the judgment. Defendant's first two contentions are forfeited by his failure to lodge timely and specific objections in the trial court. Anticipating this conclusion, defendant asserts his trial counsel provided constitutionally deficient assistance by failing to so object. Because any assumed deficiency in counsel's performance does not undermine our confidence in the outcome, we must reject these assertions of ineffective assistance of counsel. Nor does a cumulative prejudice analysis require reversal of defendant's convictions. Finally, because defendant's post-verdict motion cannot be reasonably construed as a request to discharge his retained counsel and have new counsel appointed to represent him during the sentencing hearing, we cannot fault the trial court for not holding the hearing to which defendant now claims he was entitled.

FACTS

In September 2012, defendant left the Rusty Nail Saloon in Pollock Pines around 10:00 p.m. in his Chevy pickup and headed westbound on Pony Express Trail toward his home that was located between Placerville and Coloma. While defendant apparently had only one beer at the Rusty Nail, he had "a couple" beers at another bar a short distance away, the Pine Lodge Club, before heading to the Rusty Nail for his final beer of the night. He also had "two to three" beers at another bar in Placerville, the Liars' Bench, before that. In addition to the alcohol, defendant's system also contained tetrahydrocannabinol (THC), the principal psychoactive constituent of marijuana, and alprazolam, a benzodiazepine sold under the proprietary name Xanax, both of which add to the intoxicating effects of alcohol.

Meanwhile, Denise Caldwell and her husband, Scott, were driving eastbound on Pony Express Trail in separate vehicles. They were heading to their home in Cedar Grove after meeting in Rancho Cordova for dinner earlier in the night. Caldwell was driving a Subaru; her husband followed in a pickup truck about 50 yards behind. As Caldwell led their homebound caravan into a curve in the roadway at a speed of 10 to 15 miles per hour, Scott heard a "horrific noise" that sounded like an explosion, saw a cloud of smoke in front of him, and pulled his truck over to the side of the road. The sound Scott heard was his wife's Subaru being impacted head on by defendant's Chevy truck as it came around the curve in the opposite direction. The force of the collision and height difference between the vehicles caused the Chevy to drive over the front of the Subaru and embed itself into the front cabin where Caldwell was seated, driving the Subaru backward, spinning the entangled vehicles perpendicular to the roadway, and then flipping them upside down, Subaru on top of Chevy. Caldwell was killed nearly instantly.

Two El Dorado County Sheriff's deputies happened to be parked in their patrol cars about 150 yards away. Hearing what they also described as an explosion, they immediately drove to the crash site. Defendant was crawling out of his truck when they arrived. Caldwell's husband, who had run to the wreckage to find his wife's lifeless body upside down in the Subaru, was screaming and appeared to be in shock. He lunged at defendant and had to be restrained by one of the deputies. Defendant, who smelled of alcohol, was taken to one of the patrol cars by the other deputy.

CHP officers and emergency medical personnel arrived a short time later. After defendant was checked out by an emergency medical technician, he was advised of his *Miranda*[1] rights and questioned by CHP Officer Ian Hoey, who also noted defendant smelled of alcohol. Defendant claimed he was heading home from Placerville. When Officer Hoey pointed out defendant was actually heading toward Placerville from farther east, defendant briefly argued with the officer and then maintained he was heading home regardless of the direction. Defendant also claimed he had one beer two or three hours before the collision at a bar in Pollock Pines or Cedar Grove. When the officer explained that was near where they currently were, defendant appeared to be confused. Observing signs of intoxication, Officer Hoey administered a field sobriety test that also indicated defendant was intoxicated. Two preliminary alcohol screening (PAS) tests, administered four minutes apart, revealed a blood alcohol content of 0.118 percent and 0.12 percent, respectively.

Defendant was arrested and transported to the hospital to be medically cleared before being taken to jail. Officer Hoey accompanied defendant during the ride to the hospital. In the ambulance, defendant admitted to "drinking more" than the one beer,

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

although the officer did not say how much more. Defendant also admitted to smoking marijuana earlier in the night. A blood sample taken at the hospital an hour after the collision was tested for the presence of alcohol, revealing defendant's blood alcohol content was 0.12 percent at the time of the blood draw and might have been as high as 0.14 percent at the time of the collision due to the fact alcohol is eliminated from the bloodstream at an average rate of 0.02 percent per hour. As previously mentioned, defendant's blood also contained THC and alprazolam.

An analysis of the forensic evidence at the crash site revealed defendant's Chevy entered the curve where the crash occurred at about 57 miles per hour, faster than the posted speed limit of 45 miles per hour and nearly double the safe speed for taking that particular curve, causing one of the truck's tires to scuff the roadway. The location of the scuff mark revealed defendant's Chevy was completely in Caldwell's lane as he came around the curve. In an apparent attempt to avoid the collision, Caldwell slowed her Subaru to about 4 miles per hour and moved it to the outside of her lane just before impact. Defendant's Chevy also slowed, but only to about 50 miles per hour. Impact was head on, but slightly off center. As mentioned, the Chevy essentially drove over Caldwell's Subaru, embedding itself into the front cabin and driving the Subaru backward as the entangled vehicles spun around and flipped over, causing Caldwell's death.

In order to prove the malice element of the murder charge, the prosecution presented evidence of a prior DUI conviction defendant sustained in Hawaii in 2006, along with a DUI course he took in connection with that conviction. The course included a video designed to impress upon the participants the grave risks inherent in driving

under the influence, including death. We describe this DUI video in greater detail in the discussion portion of this opinion.[2]

DISCUSSION

I

Admission of the DUI Video

Defendant contends the trial court prejudicially erred and violated his federal constitutional right to a fair trial by admitting into evidence the aforementioned DUI video. We conclude this contention is forfeited by defendant's failure to object to the admission of the video in the trial court on the grounds now asserted on appeal. Anticipating forfeiture, defendant filed a supplemental brief asserting his trial counsel rendered constitutionally deficient assistance by failing to so object. Assuming counsel's performance in this regard fell below an objective standard of reasonableness, we nevertheless conclude there is no reasonable probability the result of the proceeding would have been different had counsel objected to the admission of the video.

A.

Additional Background

The prosecution moved in limine to admit evidence of defendant's prior DUI conviction and the course he attended in connection with the conviction, including the

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[2] This video was also used by the prosecution to establish gross negligence on the part of defendant, although it was not needed for this purpose. The aforedescribed evidence, without the DUI video, established defendant's guilt of the crime of gross vehicular manslaughter while intoxicated. He drove his truck while intoxicated, took the curve faster than the posted speed limit and nearly twice as fast as the safe speed for taking the curve while completely in the oncoming lane of traffic, grossly negligent violations of the Vehicle Code, the proximate result of which was Caldwell's death. (See Pen. Code, § 191.5, subd. (a).)

challenged DUI video, arguing the evidence was relevant to prove implied malice and gross negligence. At the hearing on the motions, the trial court indicated that, while it had not yet reviewed the video, the tentative decision would be to allow the proposed evidence. The trial court then heard from counsel on the matter. Defense counsel argued evidence of the DUI conviction was "improper character and propensity evidence." With respect to the DUI course, defense counsel stated: "As far as the class is concerned, I did indicate before, if anything, that is the only thing that would have put [defendant] on notice that what he -- the alleged DUI now was dangerous, and therefore I could see the relevance there." In response, the prosecutor confined his argument to the conviction and argued the fact of a DUI conviction, in and of itself, is relevant to prove malice and gross negligence because "the reason that driving under the influence is unlawful is because it is dangerous." The trial court confirmed its tentative ruling would be "to grant both the admission of the Hawaii conviction, provided that the proper documentation is presented to show that it's a valid conviction, and the consequences of the alcohol class that he was given in Hawaii, subject to [the trial court's] reviewing [the video] and going through the rest of these class materials that were provided."

During trial, after evidence was admitted concerning defendant's prior DUI conviction, the trial court read the following stipulation to the jury: "It is hereby stipulated between the parties, the People of the State of California and the Defendant, through his counsel, that [defendant] attended a court-mandated [DUI] education class on May 8th and 9th, 2007, in the State of Hawaii that was taught by Instructor Rita K. Kahalioumi. [¶] And as a participant of the class, [defendant] was instructed using a workbook entitled Prime for Life Participant Workbook, Version 8.0, and was shown the video entitled Reflecting, Making the Risk Real, The Spiral." At defense counsel's request, the trial court also gave the jury the following limiting instruction: "Ladies and gentlemen, we have certain rules of evidence, and one of the rules of evidence is that

some prior issues cannot be considered for purposes of showing an individual's propensity to commit an existing act. [¶] In other words, you cannot consider the fact that [defendant] was convicted of DUI in Hawaii to conclude that, well, he must have been DUI in this particular case. [¶] You can, however, consider the effect of that conviction with respect to the classes that he took as to his knowledge of the dangerousness or the consequences of driving while intoxicated. [¶] So you can't simply conclude that, well he did it before, so he must have done it this time. But you can use the information from the class and from the conviction to consider whether or not [defendant] had knowledge of the dangerousness and the consequences of driving while impaired."

At the conclusion of the prosecution's case, as the trial court and counsel conferred about which exhibits would be admitted into evidence, the trial court asked whether defense counsel objected to the DUI video's admission into evidence. Defense counsel answered: "No." The trial court then noted that while it had seen the video and did not "have any objection to it," the jury had not yet seen the video. At this point, defense counsel stated: "I'll object and submit, Your Honor." The trial court then asked the prosecutor: "How do we . . . have something admitted into evidence that's not been presented to the jury beforehand?" The prosecutor responded by asking to play the video for the jury. The trial court then asked whether defense counsel had seen it, to which counsel responded: "I've seen portions of it, yes. And it's -- and, again, it's just the generic DUI video." Defense counsel then elaborated on his objection: "Well, we've already stipulated that he's seen it. We've already stipulated that he's gone through the class, he's attended the class, and he's seen the video. [¶] And I think we've had testimony as to, you know, the content of the video, you know, what the purpose of the video is. [¶] I don't think that having the jury see the entire video is going to be any more probative than it is now. You know, the whole purpose of the video -- telling the

jury what happened was to say 'Hey, he suffered a DUI before. He's gone through classes. He should have known better.' [¶] I think [the prosecutor]'s gotten that message across without showing the video."

The trial court overruled the objection and allowed the prosecutor to play the DUI video for the jury. The prosecutor elected to play a portion of the video, titled, "Making the Risk Real" that lasted about 40 minutes. This portion of the video was divided into 8 segments, each of which described an incident of driving under the influence that caused serious injury or death. We decline to describe each of the segments. For our purposes, it will suffice to observe that the segments, through interviews with the victims who survived, the family members and friends of those who did not, and the drivers who caused the harm by driving under the influence, revealed the consequences of such behavior, not only for the victims and their loved ones, but also for the impaired driver, such as criminal and civil liability and feelings of remorse and shame for having killed or seriously injured the victim. We also note, as defendant correctly observes, the video informed the viewer of the specific punishments imposed upon 7 of the impaired drivers featured in the video, ranging from a grant of probation to serving 35 years in prison.

B.

Forfeiture

Defendant claims his trial counsel "objected to the playing of the [DUI video] *apparently* pursuant to Evidence Code section 352"[3] and relies exclusively on *People v. Diaz* (2014) 227 Cal.App.4th 362 (*Diaz*) in arguing such an objection should have been sustained due to the fact the DUI video "contained prejudicial material very

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3 Undesignated statutory references are to the Evidence Code.

much like the videos [held to have been unduly prejudicial] in *Diaz*." We conclude defense counsel made no such objection before the trial court, forfeiting the claim on appeal.

"Section 353 provides in pertinent part, 'A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . .' (Italics added.) In accord with this statute, our high court has consistently held that a ' " 'defendant's failure to make a timely and *specific* objection' on the ground asserted on appeal makes that ground not cognizable. [Citation.]" ' [Citation.] ' "The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." ' [Citation.] ' "[T]he objection must be made in such a way as to alert the trial court to the . . . basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of *the specific reason or reasons* the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. *A party cannot argue the court erred in failing to*

conduct an analysis it was not asked to conduct.' [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 168-169.)

Here, defendant's trial counsel went from acknowledging the relevance of the DUI video and offering no objection to its admission into evidence, to objecting without any stated basis and submitting the matter, to clarifying the basis of the objection was that the stipulation and testimony from a witness who obtained the Hawaii DUI records already informed the jury of "the purpose of the video," so the message defendant "should have known better" was already delivered without showing the video to the jury. None of this would have placed the trial judge or the prosecutor on notice defendant was challenging the admission of what counsel referred to as "the generic DUI video" as being *unduly prejudicial* under section 352. Having failed to ask the trial court to engage in a weighing of the probative value of the video against its likely prejudicial impact upon the jury, defendant may not argue on appeal that the trial court should have excluded the video on that basis. Nor did defendant's trial counsel argue the video's admission would violate defendant's due process right to a fair trial. These claims are therefore forfeited.

C.

Ineffective Assistance of Counsel

Nor has defendant carried his burden of demonstrating ineffective assistance of counsel.

A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him [or her] to 'the reasonably competent assistance of an attorney acting as his [or her] diligent conscientious advocate.' [Citations.]" (*Ibid*.) The burden

of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris* (1993) 5 Cal.4th 813, 832-833; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].)

We begin by noting the DUI video admitted into evidence in this case was arguably inadmissible under section 352. In *Diaz*, *supra*, 227 Cal.App.4th 362, our colleagues at the Fourth Appellate District held two similar DUI videos admitted into evidence in that DUI murder case should have been excluded as unduly prejudicial under this statutory provision. (*Id*. at pp. 381-382.) As the court explained, while a defendant's prior DUI convictions and participation in DUI educational programs are generally admissible to prove implied malice by showing the defendant's awareness of the life threatening risks of driving under the influence (*id*. at p. 378), the videos shown to the jury in that case contained "a large amount of extremely prejudicial material presented in a format uniquely likely to elicit precisely the type of prejudice that . . . section 352 is designed to prevent," such as "testimonials of multiple somber and tearful individuals discussing numerous alcohol-related vehicle crashes in which their loved ones were killed" and "numerous images that serve to heighten the emotional impact of the videos." (*Id*. at p. 380.) The court also noted, "numerous statements [in one of the videos] suggested to the jury that it would be acting in an aberrant fashion if it were to find [the

defendant] not guilty," including statements made by a prosecutor and a defense attorney "suggest[ing] that those who are charged with alcohol-related driving offenses are likely to be found guilty" and statements made by a judge indicating that "punishment is the 'only message people truly understand . . . in [these] type[s] of cases,' and that 'punishment in this area has more deterren[t] [effect] than punishment for a lot of other crimes,' " that the court found to be "[p]erhaps even more wrought with the potential for prejudice." (*Id.* at pp. 380-381.) Finally, with respect to a statement made by an inmate in one of the videos indicating he believed "he would be incarcerated for four years," the court stated: "Not only is this punishment-related comment entirely irrelevant to proving the charged offense, it was also uniquely likely to cause prejudice in that the statement implicitly suggested that [the defendant] would be incarcerated for a similar, relatively short, period of time if convicted since [the inmate in the video], like [the defendant], was responsible for an alcohol-related crash in which one of his friends died and a second friend was seriously injured." (*Ibid.*)

The DUI video in this case similarly showed tearful testimonials and contained irrelevant information concerning the punishments imposed upon the impaired drivers who killed or seriously injured their victims. We do, however, believe the video was highly probative with respect to defendant's actual knowledge of precisely the type of danger his actions created. (See *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532 [to argue the defendant would not have realized after exposure to DUI education program it was dangerous to drink alcohol and drive "is little short of outrageous"].) Indeed, the video was likely memorable for the same reasons defendant argues it was unduly prejudicial.

Nevertheless, given the fact the issue is not properly preserved for review, we decline to resolve the question of whether this particular video's probative value was substantially outweighed by the danger of undue prejudice. Even assuming the video

should have been excluded under section 352, and defense counsel's failure to object to its admission on this ground fell below an objective standard of reasonableness, we conclude there is no reasonable probability the result of the proceeding would have been different had such an objection been made. Unlike *Diaz*, *supra*, 227 Cal.App.4th 362, where the Court of Appeal held the admission of the videos in that case required reversal, the video shown to the jury in this case did not contain commentary from the legal community, including a judge's statements about sending a message to impaired drivers, which we agree would have suggested to the jury in the *Diaz* case a not guilty verdict would be an aberrant result. Here, there was no such suggestion. Also unlike *Diaz*, the punishments imposed on the impaired drivers featured in the video shown to the jury in this case spanned from a grant of probation to serving 35 years in prison. Thus, it is less likely the jury in this case would have simply assumed a murder conviction on these facts would carry a light sentence. And while the video in this case did contain tearful testimonials similar to those contained in the videos in *Diaz*, we do not believe these testimonials would have so inflamed the jury as to render it unable to decide defendant's guilt on the evidence presented. Indeed, we concur in defense counsel's assessment of the video as a fairly generic DUI video. Finally, unlike *Diaz*, there are no indications in the record that the jury focused on the video in their deliberations or the jury considered this to be a close case. The evidence admitted against defendant, aside from the DUI video, was very strong.

Simply put, while playing the DUI video for the jury was more prejudicial than providing it with a summary of what defendant was meant to take away from it, we cannot conclude there is a reasonable probability the result would have been any different had the latter course been taken rather than the former. For this reason, we must conclude defendant has not established prejudice flowing from his trial counsel's failure

to prevent the admission of the challenged video and reject his assertion of ineffective assistance of counsel.

II

Prosecutorial Misconduct

Defendant also asserts the prosecutor committed prejudicial misconduct by eliciting testimony from the CHP officer who questioned defendant at the scene of the collision regarding his opinion defendant lacked remorse and was more concerned about himself than the deceased victim. We conclude this claim is also forfeited by defendant's failure to object to the asserted misconduct and request curative instructions. Again anticipating this conclusion, defendant charges his trial counsel with constitutionally deficient performance. Because any assumed deficiency in counsel's performance does not undermine our confidence in the outcome, we reject this claim as well.

A.

Additional Background

As previously mentioned, Officer Hoey questioned defendant in the back of the patrol car at the crash site, administered the PAS tests, and accompanied defendant during the ride to the hospital. All but the ride to the hospital was captured on the patrol car's video camera. The video was played for the jury. While defendant was taking one of the PAS tests, it appeared as though he was attempting to "trick the machine" by not exhaling enough of his breath into the device. When the officer told him he stopped blowing too soon, defendant responded: "Bullshit." The officer then told defendant to blow into the machine like "blowing bubbles through a soda straw," which caused defendant to laugh. During the officer's testimony concerning this test, the prosecutor asked: "Did you note anything unusual about [defendant's] demeanor while you were attempting to give this test?" The officer answered: "I'll be candid. He's sitting in the back of a patrol car, being interviewed. Obviously, under investigation for DUI,

following a horrendous collision. Saying 'bullshit' to a police officer while he's giving you a test and then chuckling, I was surprised." Later, during the officer's testimony concerning the ride to the hospital, the prosecutor asked: "And before you got to the hospital, what was his demeanor during that time? Was he showing any remorse or --" The officer answered: "There was no remorse," adding: "He was more concerned about himself." There was no objection to this line of questioning.

During cross-examination of Officer Hoey, defense counsel asked: "And you were asked yesterday regarding your conclusion as to whether or not [defendant] was remorseful. Do you recall that?" The officer said he did. Defense counsel continued: "[Y]our response was he was in the back of the car, arguing with you, and I think you said that he chuckled once." The officer agreed. Defense counsel then asked: "At that point when that occurred . . . you hadn't informed him as to [Caldwell's] condition, correct?" The officer again agreed. Defense counsel continued: "So you're reaching the conclusion as to his remorse, but he had yet to be informed as to what occurred." The officer responded: "I was asked what my opinion was, whether he was remorseful of the collision, and I said he was not, in my opinion."

Toward the end of the redirect examination, the prosecutor resumed the remorse line of questioning with: "And, lastly, . . . you testified yesterday that [defendant] was not remorseful?" Officer Hoey agreed. The prosecutor continued: "And counsel was questioning you about when he knew that -- that [Caldwell] was deceased. Do you recall his questions relating to that?" The officer answered: "I do. I did mention to [defendant] during that investigation, prior to notifying him that she was deceased, that the medics were still cutting her out of the vehicle. [¶] And the remorse statement that I made is based on the fact that a logical person, understanding and seeing the collision from the position of the patrol car, would understand if somebody is being cut out of a vehicle --" An objection on the basis of speculation and lack of foundation was overruled. The

prosecutor then asked: "As far as remorse, you were with [defendant] for quite a period that evening, isn't that correct, and on into the next morning; is that fair to say?" The officer agreed. The prosecutor continued: "And at the end of the videotape, you tell [defendant] directly 'She's dead.' Isn't that correct?" The officer again agreed. Finally, the prosecutor asked: "And subsequent to that time, did you notice any remorse by [defendant]?" The officer answered: "No, sir. I did not." There was no objection to this resumed line of questioning, except for the speculation and foundation objection noted above.

B.

Forfeiture

" 'To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his [or her] objection, and ask the trial court to admonish the jury.' [Citation.] There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. Forfeiture for failure to request an admonition will also not apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition." (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

Here, defendant's specific appellate contention is the prosecutor committed prejudicial misconduct by eliciting Officer Hoey's opinion regarding defendant's lack of remorse for having caused the crash that ended Caldwell's life. Defendant does not argue this specific contention was preserved by his trial counsel's single belated objection, on speculation and foundation grounds, to the officer's explanation for *why* he believed defendant lacked remorse. At the time that objection was made, the officer's opinion as to defendant's lack of remorse had already been elicited, without objection, by the

prosecutor's questioning during the direct examination, and reaffirmed in response to defense counsel's questioning during cross-examination. Nor does defendant argue one of the exceptions to the forfeiture rule applies. Instead, defendant argues his trial counsel provided constitutionally deficient assistance. We address and reject this argument immediately below.

C.

Ineffective Assistance of Counsel

Again, the burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden*, *supra*, 16 Cal.3d at p. 816.) " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*In re Harris*, *supra*, 5 Cal.4th 813, 832-833; *Strickland v. Washington*, *supra*, 466 U.S. at p. 687.)

Here, as defendant correctly observes, "unless a defendant opens the door to the matter in his or her case-in-chief [citation], his or her remorse is irrelevant at the guilt phase." (*People v. Jones* (1998) 17 Cal.4th 279, 307.) However, even assuming defense counsel had no reasonable basis for failing to object to the prosecutor's questions regarding defendant's lack of remorse, we conclude there is no reasonable probability the outcome would have been different had such an objection been made. Again, the case against defendant was very strong. The evidence established defendant was driving while impaired by alcohol, his reckless driving while so impaired caused

Caldwell's death, and he had a prior DUI conviction and took a DUI education course that would have informed defendant of the grave risks inherent in such behavior, including death. We are confident the jury would have found defendant guilty of gross vehicular manslaughter while intoxicated and second degree murder even had Officer Hoey's opinion regarding defendant's lack of remorse been excluded from evidence.

III

Cumulative Prejudice

Defendant further asserts the cumulative prejudice flowing from the foregoing claims requires reversal. We disagree. Neither singly nor cumulatively do these claims establish prejudice requiring reversal of defendant's convictions. (See *People v. Lucas* (1995) 12 Cal.4th 415, 475-476.)

IV

Failure to Hold a Hearing Regarding Substitution of Counsel

Defendant's final contention is the trial court erred by not holding a post-verdict hearing on his mislabeled motion to discharge his retained counsel and have new counsel appointed to represent him during the sentencing hearing. He is mistaken.

A.

Additional Background

Defendant was represented at trial by retained counsel, Arturo Reyes, Jr. Following the verdict and nine days before the sentencing hearing, defendant filed a standard form motion for substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). In addition to checking the standard boxes on the form, the motion complained Reyes's ineffective representation "resulted in a guilty verdict" and "should result in a mistrial or reversal or retrial so [defendant] can obtain

effective counsel and have a proper trial with a [competent defense] lawyer for a fair trial."

At the sentencing hearing, the trial court noted it had received the *Marsden* motion and denied it as "not applicable." The trial court then proceeded with the sentencing hearing. Neither defendant nor Reyes offered any objection to doing so. Indeed, the record indicates defendant conferred with his attorney prior to presenting a statement from his brother, who asked the trial court to consider defendant "wasn't well mentally" when the collision occurred.[4]

B.

Analysis

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his [or her] decision to discharge an attorney whom he [or she] hired but no longer wishes to retain.' [Citations.] When a defendant makes a 'timely motion to discharge his [or her] retained attorney and obtain appointed counsel,' unlike when a defendant seeks to substitute one appointed counsel for another, he [or she] is not required to demonstrate 'inadequate representation by his [or her] retained attorney, or to identify an irreconcilable conflict between them.' " (*People v. Maciel* (2013) 57 Cal.4th 482, 512.)

"The right to discharge a retained attorney is, however, not absolute. [Citation.] The trial court has discretion to 'deny such a motion if discharge will result in

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[4] At the start of the sentencing hearing, Reyes asked for a continuance after receiving information from defendant's brother that morning indicating defendant had been treated for schizophrenia four weeks before the fatal collision. The request was denied.

"significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice." ' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 311.) The trial court must therefore "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Lara* (2001) 86 Cal.App.4th 139, 153.) It must also "exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.)

Defendant argues this case is similar to *People v. Munoz* (2006) 138 Cal.App.4th 860 (*Munoz*), in which the Court of Appeal held the above-stated standard for relieving retained counsel also applies in the post-conviction setting. (*Id*. at p. 869.) There, after the defendant was convicted and before he was scheduled to be sentenced, he wrote a letter to the trial court raising concerns about his retained counsel's performance and asking the court to appoint a new attorney to represent him. (*Id*. at p. 864.) At the scheduled hearing, the trial court required the defendant to demonstrate incompetent representation or a conflict of interest in order to obtain new counsel, which he failed to do. (*Id*. at pp. 864-865.) The trial court then postponed the sentencing hearing for five weeks, but declined to allow the defendant to relieve his retained attorney. (*Id*. at p. 865.) The Court of Appeal held the trial court erred in requiring a showing of incompetence to support the defendant's request to relieve his retained counsel. (*Id*. at p. 866.) The court also held the trial court abused its discretion in denying the request because the defendant raised genuine concerns about his attorney, and there was no indication in the record that granting the request would have resulted in disruption, especially since the trial lasted only two days, preparing the record for review by a new attorney would not have taken a long time, and the trial court delayed the sentencing hearing for five weeks anyway. (*Id*. at pp. 869-870.)

Unlike *Munoz, supra*, 138 Cal.App.4th 860, where the letter written to the trial court clearly stated the defendant sought to relieve his retained counsel and have new counsel appointed to represent him in the filing of a new trial motion and during the sentencing hearing (*id*. at p. 864), here, defendant filed a *Marsden* motion the trial court correctly found to be inapplicable. Unlike the situation here, a *Marsden* motion seeks to have appointed counsel relieved and replaced with new appointed counsel due to inadequate representation or an irreconcilable conflict. (See *People v. Ortiz*, *supra*, 51 Cal.3d at p. 984.) Notwithstanding the improper labeling, defendant argues the motion he filed nevertheless sought the same relief sought in *Munoz,* i.e., discharge of his retained counsel and replacement with new appointed counsel. While we acknowledge the trial court could have construed the motion that way, we cannot conclude it was required to do so. Unlike the letter written to the trial court in *Munoz,* defendant's *Marsden* motion did not ask to have new counsel appointed for purposes of filing a new trial motion or representing him at sentencing. Instead, it complained his trial counsel's alleged inadequate representation caused him to be convicted and appears to have been premised on the notion the trial court could turn back the clock and appoint a new attorney so he could have a proper and fair trial. Our reading of the motion is bolstered by the fact neither defendant nor his retained counsel objected to the trial court's ruling that the motion was an inapplicable *Marsden* motion rather than a mislabeled *Munoz* motion, nor did either indicate to the trial court defendant was uncomfortable proceeding to sentencing with Reyes as his attorney. Indeed, their conduct during that hearing would have indicated the opposite to the trial court.

Based on this record, we conclude the trial court properly denied the motion as inapplicable because there was no clear indication in the *Marsden* motion defendant actually sought to discharge his retained counsel and have new counsel appointed for purposes of proceeding to sentencing.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
BLEASE, Acting P. J.

/s/
BUTZ, J.